

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1112

No. 77-1112

To be argued by
George J. Koelzer

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET No. 77-1112

UNITED STATES OF AMERICA

Appellee,

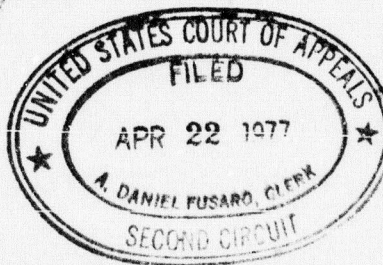
-vs-

HAROLD STEPHEN ERM

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLANT
HAROLD STEPHEN ERM



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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was it a violation of the Confrontation Clause of the Sixth Amendment for the trial judge to limit the cross examination of a major Government witness?
2. Was it a denial of due process to sentence defendant Erm to 1 year's imprisonment solely because the trial judge believed he committed perjury?
3. Did the denial of defendant Erm's motion for a severance deny Erm a fair trial?
4. Was it error to permit the Government to corroborate a principal witness by reading his pre-trial statement to the jury?
5. Did the trial Court err in charging the jury on the elements of the crimes charged, if its charge on basis of recently stolen property and its charge on reasonable doubt?

STATEMENT OF THE CASE

Harold S. Erm was indicted on July 22, 1976, along with 3 other defendants. Erm was charged with conspiracy to steal and possess goods in interstate shipment, 18 U.S.C. 371. and possession of goods stolen from an interstate shipment, 18 U.S.C. 659. In December, 1976, Erm, with the co-defendants, was tried in the United States District Court for the Southern District of New York, and upon jury verdict, was convicted of both counts. On February 17, 1977, he was sentenced to one year in the custody of the Attorney General on Count I of the indictment, and 5 years probation on Count II, and from the judgment of conviction appeals to this Court.

STATEMENT OF FACTS

On February 5, 1976, a tractor-trailer carrying a load of meat from Chicago, Illinois to New Jersey was stolen from the parking lot of the Chris-Ann Motel in North Bergen, New Jersey, where it had been parked for the night. Early in the morning of February 6, 1976, defendant George Frederick Riker brought the tractor-trailer, still loaded with meat to the home of Ronnie George Hamilton in Nanuet, New York. Over the next few days, Hamilton, Riker and others unloaded a quantity of meat from the trailer and Hamilton gave some of the meat to relatives, neighbors and friends.

On February 9, 1976, Special Agents of the Federal Bureau of Investigation "staked out" the area around Hamilton's home and the truck and that day arrested Hamilton, Riker and a Michael Betz.

Ronnie Hamilton, and his wife, Joy Hamilton, testified for the Government at the trial below. Among other things, Hamilton testified he had once been in the motorcycle business, had owned motorcycles and had serviced and repaired motorcycles at home in Nanuet. According to the Hamilton's defendant Erm was at their home on Saturday night, February 7, 1976, and assisted Hamilton, Riker and others in unloading meat from the tractor-trailer. Again, according to the Hamilton's, on Sunday night, February 8, 1976, defendant Erm, along with co-defendants Riker, O'Brien, Giordano and others participated along with Hamilton in unloading meat from the trailer.

According to Joy Hamilton, on the night of February 9, 1976, after her husband, Riker and Betz had been arrested and taken to New York, two men who had been at their home Saturday night, February 7, 1976, came to her home. According to Joy Hamilton, one of the men was the defendant Erm, Mrs. Hamilton testified that she had a conversation with Erm. The men asked Mrs. Hamilton where Riker was. Mrs. Hamilton said she explained that the FBI was there during the day and had arrested her husband, Riker and Betz. According to Mrs. Hamilton, defendant Erm left a box of motorcycle parts for her husband and then gave her \$400.00 which she claimed Erm said was to pay Riker for meat they had sold.

Upon cross examination Mrs. Hamilton said she could not state positively the exact words or whether she only assumed that the \$400.00 was for the meat. It was not until a few months later that the Hamilton's identified a photograph of defendant Erm as resembling one of the persons at their home on the weekend of February 7,8,9,1976.

Special Agent Charles Colitre testified for the Government of an interview he had with defendant Erm on June 29, 1976. According to Colitre, Erm told him of knowing Riker and that on a Friday night in February Riker took him to Nanuet. (It is noteworthy that no other witnesses, including the Hamilton's, stated that Riker or Erm were at Nanuet on Friday, February 6, 1976.)

Colitre further testified that Erm said they returned to Nanuet the following Sunday, at which time, according to Colitre, Erm said he gave Hamilton's wife \$400.00, motorcycle parts and T-Shirts

for Hamilton. Colitre further testified that Erm was uncertain about the dates when things happened.

After the Government rested, the defendant Erm called a character witness and three witnesses, William Traut, Salvatore Cottone and Bonnie Erm (his wife). These three witnesses testified that on Saturday, February 7, 1976, they saw Mr. Erm at his father's repair shop in Caldwell, New Jersey until about 9:00 or 9:30 pm., at which time Erm left, picked up his wife at their home and shortly thereafter the Erm's met Cottone and a girlfriend at a restaurant in Dover, New Jersey. There they had dinner until about midnight.

Defendant Erm testified that he was engaged in a motorcycle shop in Caldwell, New Jersey. He had known defendant Riker after having met him (as had Ronnie Hamilton) in the course of his business. Riker operated a shop in Paterson, New Jersey where he did chrome plating. According to Erm, on Sunday, February 8, 1976, he received a call from Riker. Erm was at his shop, which he was in the process of liquidating since Erm had resumed working for his father in another shop down the street. Erm had a large inventory of motorcycle parts for sale and he testified that Riker was aware of this and suggested Erm accompany Riker to Nanuet, where Riker knew another person in the motorcycle business. That turned out to be Ronnie Hamilton. Erm went with Riker to Nanuet on Sunday night and discussed with Hamilton the sale of the motorcycle parts. He returned to Nanuet the following night to deliver motorcycle parts to

Hamilton. When he learned that Hamilton and Riker had been arrested he left money with Mrs. Hamilton for Riker; Erm testified he had owed Riker the money for chrome plating work for two-three months.

He recalled the interview with Special Agent Colitre and was positive he did not tell Colitre that he had had a conversation with Riker about meat nor did he tell Colitre, according to his recollection, that his first night at Nanuet, New York, was on Friday. He recalled that he told Colitre that he was at Hamilton's home on two consecutive days. He was positive that he was first at the Hamilton's home on Sunday, having followed Riker in his pick-up truck. He was positive that on Saturday, February 7, 1976, he had had dinner along with his wife, Salvatore Cottone and Cottone's girlfriend at the Green Lantern Restaurant in Dover, New Jersey.

George Riker testified in his own defense. He testified that he did not see Erm on Saturday, February 7, 1976 but on February 8, 1976, he called Erm and told he he knew a person in Nanuet who might be interested in buying part of Erm's inventory of motorcycle parts. Erm met him and followed him to Nanuet on Sunday night, February 8, 1976.

Special Agent Colitre was recalled for rebuttal by the Government. He reiterated his earlier testimony about the interview of Erm on June 29, 1976 and differed with Erm as to the details of that interview. Colitre testified that he took rough notes during the interview and several days later dictated a memorandum from the rough notes, and after destroyed the rough notes. Counsel for

Erm was precluded from cross examining Colitre in detail about the procedure in the interview and thereafter recording the interview. (Tr. 1452-1463).

Thereafter, after summation and the charge to the jury, the jury deliberated approximately five hours, and found Erm guilty on both counts, co-defendant O'Brien guilty on both counts, co-defendant Riker guilty on four counts and co-defendant Giordano not guilty on both counts.

POINT I

IT WAS A VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT FOR THE TRIAL JUDGE TO LIMIT THE CROSS EXAMINATION OF A MAJOR GOVERNMENT WITNESS.

During its case in chief, the Government called Special Agent Charles Colitre of the Newark office of the FBI, who testified about an interview he conducted of the defendant Erm on June 29, 1976. Thereafter, Erm testified in his own defense, and contradicted Colitre on several points. The Government then recalled Colitre in rebuttal.

Thus, as to defendant Erm, it is fair to say that to a large degree his guilt or innocence would be determined by the jury by determining whose testimony they would accept - Colitre or Erm. Recognizing this, counsel for Erm commenced a detailed cross examination of Colitre, to test his credibility. Among the areas he sought to explore was the method or procedure by which Colitre (and the FBI) conducted interviews and reduced them to writing in memorandum form, dictated from rough notes of the interview several days later. It became important to establish that at the point in time where Colitre interviewed Erm, he was fully aware of every detail of the investigation into the crime by the New York Office of the FBI, even though he worked in a different office, in Newark.

When this detailed cross examination of Special Agent Colitre was commenced, it was met by a series of objections and rulings by the Court, which severely limited the scope of the cross examination (Tr. 1452-1463). Particularly in view of the critical nature of the

witness' testimony, as to the credibility of the defendant Erm, it is submitted that the limitation by the Court upon the cross examination of the FBI agent amounts to a violation of the Confrontation Clause of the Sixth Amendment.

The issue was perhaps best expressed by Chief Justice Burger in Davis v. Alaska, 415 U.S. 308 (1974) at pp. 315-16:

"The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400 (1965). Confrontation means more than being allowed to confront the witness physically. "Our cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418 (1965). Professor Wigmore stated:

'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.'

5 J. Wigmore, Evidence 1395, p. 123 (3d ed. 1940). (Emphasis in original.)

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness."

It was never suggested (nor could it be) that the proposed cross examination of the FBI agent would be "repetitive and unduly harassing".

One of the important objectives of the right of confrontation of witnesses against the accused is the guaranty that the fact finder has an adequate opportunity to assess the credibility of witnesses. Berger v. California, 393 U.S. 314 (1969). Cross examination, of the nature precluded in this case, is a right, not a privilege. Alford v. United States, 282 U.S. 687 (1931). See also United States v. Jorgensen, 451 F.2d 516 (10th Cir. 1971), cert. denied 405 U.S. 922.

The trial Court ruled that the proposed area of cross examination was irrelevant, and therefore restricted it (Tr. 1452-1463). The concept of relevancy is an extremely broad one, where the issue is the credibility of a witness on cross-examination. See United States v. Marti, 421 F.2d 1263 (2d Cir. 1970). Defendant Erm had the right, which was denied him, to test the truth of Special Agent Colitre's testimony by detailed cross examination. United States v. Cardillo, 316 F.2d 606 (2d Cir. 1963), cert. denied sub. nom. Margolies v. United States, 375 U.S. 822.

This issue becomes doubly important in view of the events at sentencing, discussed in Point II, infra, where the trial Court imposed a term of 1 year's imprisonment, because it found that Erm committed perjury "beyond a reasonable doubt". Thus, on the one hand, the trial Court severely limited the cross examination of the principal witness challenging Erm's credibility, and on the other hand, after the jury chose to believe the witness whose cross examination had been limited, punished Erm because the jury did not believe him.

In perhaps the most celebrated book on the subject, in its very title Francis L. Wellman describes it as "The Art of Cross-Examination", (4th Ed. 1936, The Macmillan Company, N.Y.). That is to say, it is not a science, nor a mathematically applied formula. It is precisely that - an art. And each cross-examiner has his own style. For this reason, especially where the subject of the cross examination is the crucial witness against the accused, the cross-examiner should rarely be constrained, see Davis v. Alaska, supra. Certainly he should not be forced by the trial Court to ask particular questions, in a particular way (Cf. Tr. 1454-5, 1461-2).

For this reason, the judgment of conviction of defendant Erm should be reversed, and the matter remanded for a new trial.

POINT II

IT WAS A DENIAL OF DUE PROCESS TO SENTENCE
DEFENDANT ERM TO 1 YEAR'S IMPRISONMENT, SOLELY
BECAUSE THE TRIAL COURT BELIEVED HE COMMITTED
PERJURY

At sentencing on February 17, 1977, the District Judge imposed a term of 1 year's imprisonment on Count I. (It is not disputed that defendant had no prior criminal record, is married with one child, is a hard worker, and has other indicia suggesting a more moderate sentence). The District Judge premised this judgment upon his finding that defendant committed perjury "beyond a reasonable doubt".

In this point, it should be stated immediately that we are familiar with the holding in this Court in United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974). Clearly, however, the facts in Hendrix are markedly different from the instant case, save only that the District Judge here found perjury "beyond a reasonable doubt". In its opinion, this Court quoted the trial judge in Hendrix:

"More pointedly, he (the trial judge) said this was 'the most outrageous situation of perjury in any trial' he had seen in some 13 years on the bench."

505 F.2d at pp. 1234-5

The trial judge described the defendant's testimony as "bizarre to say the least". And a description of defendant's testimony in this Court's opinion, 505 F.2d at p. 1234, shows that this is not an overstatement. No such situation obtains in the instant case.

Judge Frankel, the author of this Court's opinion, is a widely recognized scholar in the field of criminal sentencing, see Criminal Sentences, 1973, Hill and Wang, N.Y. And Judge Frankel sets forth cogent reasons why a sentencing judge may consider "perjury" by a defendant in imposing sentence, 505 F.2d at pp. 1235-7. It is respectfully suggested, however, that this Court reconsider its holding in Hendrix.

The United States Court of Appeals for the Third Circuit recently had occasion to consider this issue, in United States v. Grayson, F.2d (3d Cir. 1976). The Third Circuit considered this Court's holding in Hendrix, but concluded that to increase the sentence because of the sentencing judge's finding that a defendant committed perjury amounts to a denial of due process.

Consider, further, the dilemma of a defendant on trial. Any experienced criminal trial lawyer will say that the failure of a defendant to testify greatly enhances the prospect of a guilty verdict. In the expression of a well-known trial lawyer, a trial where the defendant does not testify is nothing more than a "slow plea of guilty". On the other hand, should he testify, and be found guilty, all the trial judge need do, as here, is to pronounce the talismanic words at sentencing that the defendant committed perjury "beyond a reasonable doubt", and his sentence is substantially increased. That is a terrible risk for a defendant to run.

In Hendrix, this Court considered and rejected this postulate, 505 F.2d at p. 1236, saying:

"...(T)o encourage a measured approach to the subject, we hold today that in the future perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it."

It is submitted that this holding should be read in context with the "bizarre" testimony of Hendrix, which was, according to the trial judge, "the most outrageous situation of perjury in any trial" he had seen as a judge. Nothing of the sort happened here.

Thus, the holding in Hendrix cannot withstand analysis. Obviously, defendants only testify at trial to exculpate themselves. Equally obvious is that a defendant must be found guilty beyond a reasonable doubt. Ipsa facto, any convicted defendant who had testified on his own behalf committed perjury "beyond a reasonable doubt", and can suffer added punishment.

Any punishment for perjury ought to be left to the United States Attorney, whose function it is to enforce the law. See United States v. Moore, 484 F.2d 1284, 1288, (4th Cir. 1973). While upholding the sentence in Moore, the 4th Circuit said:

"We caution, however, that sentencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence."

The 4th Circuit expresses the issue far better than is in our power to do so.

It is respectfully urged that this Court reexamine its rule in Hendrix, in the context of this case, (and in the light of the subsequent holding of the Third Circuit in Grayson). To be precise, we do not ask that this Court expressly overrule Hendrix (nor do we appeal from the sentence, see Gore v. United States, 357 U.S. 386, 393 (1958)), but only that the holding in Hendrix be further refined. Defendant Erm's testimony cannot be labeled "outrageous" or "bizarre". The rule in Hendrix ought not to apply in this case, and (aside from the other points raised in this appeal) defendant Erm, should his conviction be affirmed, ought to be resentenced by another judge.

POINT III

THE DENIAL OF DEFENDANT ERM'S MOTION FOR A SEVERANCE DENIED ERM A FAIR TRIAL.

On the first occasion when the four defendants and their attorneys were before the Court on pretrial matters, on September 17, 1976, counsel for defendant Erm inquired of the co-defendants O'Brien and Giordano, and their attorney, about their knowledge of defendant Erm, and his alleged participation in the crime in the indictment. Both O'Brien and Giordano stated that they had never met Erm before that day in Court (September 17, 1976). Counsel for O'Brien and Giordano assured Erm's attorney that they fully intended to testify at trial. All this was reaffirmed at a meeting of defendants and their counsel a few days before commencement of trial (Tr. 1136-1147).

At the close of the Government's case, counsel for defendant Erm was informed by counsel for defendants O'Brien and Giordano that they had elected at that time not to testify. Defendant Erm immediately moved for a severance, Rule 14, F.R.Cr.P., upon the ground that Erm was thereby denied testimony which was exculpatory (Tr.1136-1147). The trial Court denied the motion. It was error to do so.

Two Government witnesses, Ronnie Hamilton and Joy Hamilton, testified that Erm, O'Brien and Giordano, among others, were at their home in Nanuet, New York when the stolen tractor-trailer was being unloaded on the weekend of February 7-8, 1976. Had O'Brien and

Giordano testified, the Hamiltons would have been totally contradicted. Clearly the testimony of O'Brien and Giordano was exculpatory of Erm.

The trial Court has the power to order a severance under Rule 14 and has a "continuing duty to all stages of the trial to grant a severance if prejudice does appear". Schaffer v. United States, 362 U.S. 511, 516 (1960).

It is not disputed that the burden on this motion was upon defendant Erm to establish that the proposed testimony would be exculpatory, and that its preclusion by the denial of the severance prejudiced him. United States v. Kaufman, 291 F. Supp. 451 (S.D.N.Y. 1968).

It is submitted that an adequate basis was shown to the trial Court upon which it ought to have granted the severance to Erm. Not only did counsel for defendant Erm place on the record the proffered testimony from co-defendants O'Brien and Giordano, but counsel for O'Brien and Giordano agreed with the proffer (Tr. 1136-1147). Cf. United States v. Kahn, 366 F.2d 259, 264 (2d Cir. 1965), cert. denied 385 U.S. 948 (1966).

The Government opposed the motion for a severance, contending that O'Brien and Giordano, should they testify for Erm, would have to admit they lied to the FBI. Aside from the fact that this argument is irrelevant, it is also inaccurate. The proffered testimony was that O'Brien and Giordano had not met before September 17, 1976, at the United States Court House at Foley Square. Ergo, they could not have been together at Hamilton's home in Nanuet on February 7 and 8, 1976. The statements of O'Brien

and Giordano to the FBI and their proffered testimony are not inconsistent.

By denying Erm a severance the trial Court precluded Erm from calling the only other two persons who are known to have been at the Hamilton house at the times at issue in the case. These persons, O'Brien and Giordano, would have contradicted the Hamiltons' testimony that Erm was also present. Thus Erm was prejudiced, and denied a fair trial.

For this reason, the judgment of conviction of defendant Erm should be reversed, and remanded for a new trial.

POINT IV

IT WAS ERROR TO PERMIT THE GOVERNMENT TO
CORROBORATE A PRINCIPAL WITNESS BY READING
HIS STATEMENT TO THE JURY.

Over the objection of defendants, the trial Court permitted the Government to read to the jury the statement of a principal Government witness, Ronnie Hamilton, after Hamilton testified for the Government (Tr. 1439-1442). The statement was offered by the Government, and admitted by the Court below, on the theory that defense counsel had attacked Hamilton's testimony as a recent fabrication (Tr. 1053). Plainly, this is not so.

It is not disputed that under the Federal Rules of Evidence, such a statement can be admissible, not as hearsay, when the statement is "consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive...." Rule 801 (d)(1)(B).

There was no such charge, express or implied. Further, the Government argued that, since the decision not to prosecute Hamilton was not made until July, 1976 (when the indictment was returned), and he did not learn of it until the Complaint filed against him was dismissed in September, 1976, his statement to an Assistant United States Attorney on February 10, 1976 was admissible under Rule 801 (d)(1)(B). Extensive colloquy was had on the issue (Tr. 492, 1052-1065). The trial Court erroneously ruled in favor of the Government.

The Government's claim that the defense expressly or impliedly charged recent fabrication is, to say the least, ingenious, for more than one reason. First of all, it was the Government, not the defense, that first brought out the cooperation of Hamilton, and his resulting non-prosecution (Tr. 290-1). See United States v Zito, 467, F.2d 1401,1407 (2d Cir. 1972). Next, a Government agent on February 9, 1976, the day before the statement in question was given, suggested to Hamilton's wife that he would not be prosecuted if he cooperated (Tr. 655), United States v. DiLorenzo, 429 F.2d 216,220 (2d Cir. 1970); United States v. Dorfman, 470 F.2d 246 (2d Cir. 1973). Thus, the very basis for offering the statement is lacking.

Finally, at no time in opening statements nor in cross-examination of Hamilton was it ever suggested that Hamilton's testimony at trial was fabricated after he learned of the dismissal of the Complaint against him.

Of course, there was extensive cross-examination of Hamilton designed to attack his credibility. The Government apparently argues that mere cross-examination to credibility suffices as a basis under Rule 801 to admit the statement. Patently, this cannot be so, else the Federal Rules of Evidence would provide that all prior statements of a witness were admissible, once his credibility is attacked. In short, there is a distinction between cross-examination to credit, and an express or implied charge of recent fabrication.

The statement of February 10, 1976 by Ronnie Hamilton therefore was not admissible, and the judgment of conviction of defendant Erm should be reversed, and the matter remanded for a new trial.

POINT V

A. THE COURT ERRED IN ITS CHARGE TO THE JURY
ON THE ELEMENTS OF THEFT AND POSSESSION OF GOODS
IN INTERSTATE SHIPMENT.

The defendant Erm, along with the co-defendants, was charged and tried for the substantive offense of possession of goods stolen while in interstate shipment, 18 U.S.C. 659, and conspiracy to steal and possess goods in interstate shipment, 18 U.S.C. 371.

On the elements of the substantive offense, the Court charged the jury, inter alia:

"The government contends in this case that each defendant had possession of the stolen meat in that each controlled the location of the tractor-trailer or physically removed the meat from the tractor-trailer or ultimately carried the meat away from the tractor-trailer to dispose of it as they pleased.

If you find this to be the fact as to any defendant, then that defendant who had such control or connection with the meat, possessed the meat for purposes of this case."
(Tr. 1693, Riker Appendix, A26).

Objection was made to this portion of the charge (Tr. 1746-7, Riker Appendix A79-80). The Court disagreed.

The law is clear. 18 U.S.C. 659 provides:

"Whoever...steals, or unlawfully takes, carries away or conceals...from any...motortruck or other vehicle..." and

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been...stolen;"

Commits a federal crime.

Of course, a criminal statute is to be strictly construed, and a reading of this statute, 18 U.S.C. 659, clearly shows that the crime of theft (or possession) from Interstate Shipments is not complete until the goods are removed from the truck (in this instance). Put another way, when the subject tractor-trailer was stolen intact by unknown persons from the Chris-Ann Motel in North Bergen, New Jersey on the night of February 5, 1976, a theft from an interstate shipment had not yet occurred. For the crime is not complete until the goods, here, meat, was removed from the truck. United States v. Manuszak, 234 F.2d 421 (3d Cir. 1956); United States v. Cohen, 274 Fed. 596 (3d Cir. 1921).

As noted above, this was specifically pointed out to the trial Court in the objections to the charge (Tr. 1746-7, Riker Appendix A79-80), and was rejected by the trial Court.

Under the charge as given by the Court, if the jury concluded that defendant Erm "had possession of the stolen meat in that (he, or other defendants) controlled the location of the tractor-trailer...."the element of possession would have been satisfied. It should be borne in mind that the Court charged aiding and abetting, 18 U.S.C. 2, as to defendant Erm and others (Tr. 1696-7, Riker Appendix A29-30).

This is purely and simply a misstatement of the law. Since the jury was not correctly charged on the elements of the crimes alleged, the judgment of conviction of defendant Erm should be reversed, and the matter remanded for a new trial.

B. THE COURT ERRED IN ITS CHARGE TO THE JURY
ON POSSESSION OF RECENTLY STOLEN PROPERTY

We adopt the arguments of appellant Riker, pp. 15-17 of Riker brief, that the Court incorrectly charged as to the inferences, if any, to be drawn from the possession of recently stolen property. First, if, as argued above, the Court's charge as to the element of possession was erroneous, it is doubly harmful when coupled with this charge. Secondly, as this Court recognized in United States v. Brawer, 482 F.2d 117, 129-30 (2d Cir. 1973), it is no answer to say that this is a standard charge. Each charge has to be considered in light of the totality of the evidence in each case. Clearly, here it was not.

C. THE COURT ERRED IN ITS CHARGE TO THE JURY
ON REASONABLE DOUBT.

Again, we adopt the arguments of appellant Riker, pp. 21-22 of Riker brief. This was specifically objected to at the end of the charge (Tr. 1747-8, Riker Appendix A80-1).

As argued by appellant Riker, the charge to the jury that nothing can be proved "by mathematical certainty" (Tr. 1682), and that the jury should not hesitate to convict "as a clear warning that a crime of this character may not be committed with impurity. The public is entitled to be assured of this" (Tr. 1726), greatly weighs the scales of justice in favor of the Government. Such a charge is not informative to the jury, it is advocative.

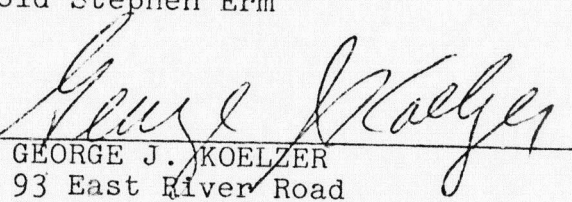
CONCLUSION

For the foregoing reasons, the judgment of conviction of defendant Harold Stephen Erm, should be reversed and the matter remanded to the United States District Court for the Southern District of New York for a new trial.

Respectfully submitted,

EVANS, KOELZER, MARRIOTT & OSBORNE
Attorneys for Appellant
Harold Stephen Erm

By:


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P. O. Box 456
Rumson, New Jersey 07760
(201)741-9550

United States of America vs.

A1
United States District Court for

SOUTHERN DISTRICT OF NEW YORK

DEFENDANT

DOCKET NO.

76 Cr 669 (R.O.)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
2 17 77

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

George J. Koelzer, esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☒ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully did conspire with others to steal and unlawfully carry away from a motor truck goods, the value of which exceeded \$100.00 which was moving as and was part of an interstate shipment of freight, and did have in their possession goods, knowing the same to have been embezzled and stolen.

(Title 18, U.S. Code, Sections 659 and 2)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

The Court having considered the defendant for treatment under the Youth Corrections Act and finds that he will not derive benefit from treatment under the Act,

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

On Count 1- ONE(1) YEAR

SPECIAL
CONDITIONS
OF
PROBATION

On Count 2- IMPOSITION OF SENTENCE IS SUSPENDED and defendant is placed on PROBATION for a period of FIVE(5) YEARS, subject to the standing probation order of this Court.

ALL RIGHTS RESERVED. NO APPEAL.

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT
RECOMMEN-
DATION

MICROFILM

FEB 22 1977

SIGNED BY

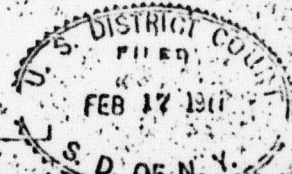
☒ U.S. District Judge

☐ U.S. Magistrate

RICHARD O. W.

2-17-77

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-1112

UNITED STATES OF AMERICA,

vs.

HAROLD STEPHEN ERM,

Appellant.

AFFIDAVIT OF MAILING

STATE OF NEW JERSEY:

SS.

COUNTY OF MONMOUTH :

GEORGE J. KOELZER, being duly sworn upon his oath, deposes and says:

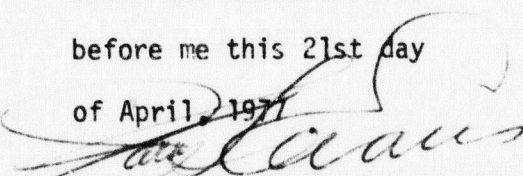
1. I am an Attorney at Law and a member of the Bar of this Court. I represent the Appellant Harold Stephen Erm in this matter.

2. On April 21, 1977, pursuant to Rule 25, Federal Rules of Appellate Procedure, I served two copies of Appellant's Brief and Appendix upon Robert B. Fiske, United States Attorney for the Southern District of New York, by mailing the same in a sealed envelope, with proper postage prepaid, to his offices at 1 St. Andrew's Place, New York, N. Y. 10007.

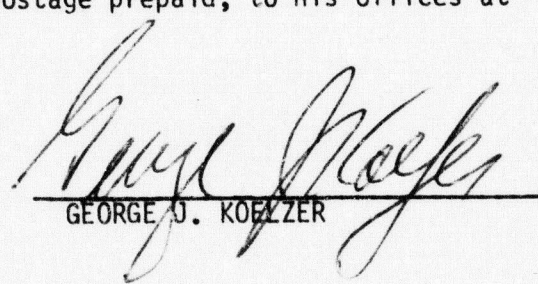
Sworn and subscribed to

before me this 21st day

of April, 1977


Harry S. Evans

An Attorney at Law of New Jersey.


GEORGE J. KOELZER

